A

AHDAH SULAIMAN

v.

SADDI ABDU RAHMAN

B

HIGH COURT SABAH & SARAWAK, SANDAKAN
DAVID WONG DAK WAH J
[ELECTION PETITION NO: S-26-02-08]
14 AUGUST 2008

C ***ELECTION:*** *Petition - Service - Election Petition Rules 1954, r. 15 - Whether mode of service as required complied with - Whether compliance mandatory - Whether petition should be struck out*

WORDS AND PHRASES: *'such service may be effected' - New r. 15 of Election Petition Rules 1954 deliberately left out the word 'may' and now provides the word 'shall' - Whether intention of Parliament to make compliance of new r. 15 mandatory*

D

The respondent was returned as the duly elected candidate with a majority of 2,017 votes for the Sabah State Legislative seat of
E Sukau on 8 March 2008 at the 12th general election. He defeated seven candidates, one of whom was the petitioner who now sought to have the respondent's election declared void for alleged corrupt or illegal practice committed by the respondent against s. 32(c) of the Election Offences Act 1954. The
F respondent, upon being aware of the petition, took out an application by way of a notice of motion to strike out the petition on the ground that the petitioner had failed to comply with r. 15 of the Election Petition Rules 1954 (r. 15) in that the petitioner failed to serve the petition on the respondent within 15 days of
G the presentation of the petition. In opposing this application, the petitioner made two contentions: (i) rule 15 of the Election Petition Rules 1954 had been complied with *via* the posting of the notice of presentation of petition and the petition on the notice board at the Sandakan High Court and (ii) alternatively, even if r. 15 of the
H Election Petition Rules 1954 had not been complied with, r. 15 was not mandatory and could not override the principles of democracy and the need to protect the purity of the election process.

I

Held (striking out petition):

(1) The new r. 15 provides three modes of service of the notice of presentation of a petition and the petition. The petitioner had not complied with any of the mode of service as required by the new r. 15. The mode of service by way of posting the notice and petition on the notice board of the High Court must now be accompanied by a publication of a notice in a national language newspaper and in any other newspaper circulating within the constituency stating that such a petition had been presented and a copy of the petition may be obtained by the respondent free of charge on application at the office of the registrar. There was no evidence from the petitioner that he had made such a publication. (para 9)

(2) The petitioner had misled the court by ignoring the fact that the old r. 15 was worded differently to that of the new r. 15. In the old r. 15, the words used were 'such service may be effected either …'. No such words are used in the new r. 15 which has deliberately left out the word 'may' and now provides that the petitioner 'shall' serve the notice of the presentation of petition and the petition *via* the three modes of service as provided. By that omission, the intention of Parliament was to make compliance of the new r. 15 mandatory. Accordingly, the petition was hereby struck out. (para 11)

Case(s) referred to:

Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors [2005] 2 CLJ 237 FC ***(refd)***

Harris Mohd Salleh v. The Returning Officer (Ismail Majin) & Ors [2000] 4 CLJ 104 HC ***(refd)***

Muip Tabib v. Dato' James Wong [1971] 1 MLJ 247 ***(refd)***

Ramely Mansor v. Suruhanjaya Pilihanraya Malaysia & Ors [2000] 6 CLJ 56 HC ***(refd)***

Yusuf Abdul Rahman v. Abdul Ajis Abdul Majeed & Anor [2000] 5 CLJ 215 HC ***(refd)***

Legislation referred to:

Election Offences Act 1954, s. 32(b), (c)

Election Petition Rules, r. 15(4)

For the petitioner - Hibin Masalin; M/s Hibin & Co

For the respondent - Richard Barnes (Hassan Murtaza & Jafar Esteban with him); M/s Shelley Yap Leong Tseu Chong Chia & Co

Reported by Suhainah Wahiduddin

A

JUDGMENT

David Wong Dak Wah J:

The Application

B **[1]** The respondent was returned as the duly elected candidate with a majority of 2,017 votes for the Sabah State Legislative seat of Sukau on 8 March 2008 at the recent 12th general election. He defeated seven candidates, one of whom is the petitioner who now seeks to have the respondent's election declared void for C alleged corrupt or illegal practice committed by the respondent against s. 32(c) of the Election Offences Act 1954.

Preliminary Objection

D **[2]** The respondent upon being aware of the petition took out an application by way of a notice of motion to strike out the petition on the ground that the petitioner had failed to comply with r. 15 of the Election Petition Rules (r. 15) in that the petitioner failed to serve the petition on the respondent within 15 E days of the presentation of the petition.

Undisputed Facts

[3] The result of the election was gazetted on 8 April 2008. The petition was filed on 29 April 2008. No affidavit of service had F been filed by the petitioner as required by r. 15(4) of the Election Petition Rules. Neither was there any affidavit filed to oppose this application to strike out.

[4] The notice of presentation of the petition and the petition G had been posted on the notice board of the Sandakan High Court but there is no evidence as to when they were posted and by whom.

Petitioner's Contention

H **[5]** In opposing this application, counsel for the petitioner makes two contentions:

1. Rule 15 of the Election Petition Rules had been complied with via the posting of the Notice of Presentation of Petition and I the petition on the notice board at the Sandakan High Court; and

2. Alternatively even if r. 15 of the Election Petition Rules had not been complied with, r. 15 is not mandatory and cannot be overriding the principles of democracy and the need to protect the purity of the election process.

[6] In respect of the first contention, counsel relies on two cases, namely, *Yusuf Abdul Rahman v. Abdul Ajis Abdul Majeed & Anor* [2000] 5 CLJ 215 and *Ramely Mansor v. Suruhanjaya Pilihanraya Malaysia & Ors* [2000] 6 CLJ 56. I have read the two cases and have found them to be not applicable to the case at hand for the simple reason that they dealt with the old r. 15 which reads as follows:

> **15. Notice of petition and copy of petition to be served on respondent**
>
> Notice of the presentation of a petition, accompanied by a copy thereof, shall, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by a notice published in the Gazette or in a newspaper circulating within the constituency or electoral ward in which the election was held, or posted on the notice board of the High Court in the State in which that constituency or electoral ward is situated, stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar.

[7] In *Abdul Rahman v. Abdul Ajis Abdul Majeed & Anor (supra)*, the learned judge had summarized what the old rule had prescribed as follows:

> On the authorities cited which I am inclined to follow, it is my view that the following results regarding service are obtained as a result of the interpretation of rr. 10 and 15 by those cases, *viz*.;
>
> (1) notice of the presentation of a petition accompanied by a copy of the petition may be served personally on the respondent within 15 days of the presentation of the petition; or

(2) notice of the presentation of a petition accompanied by a copy of the petition may be served within the said time by delivering them to the advocate appointed by the respondent under r. 10; or

(3) notice of the presentation of a petition accompanied by a copy of the petition may be served by posting (within a time that ensures delivery within the said time) the same in a registered letter to the address given by the respondent under r. 10; or

(4) by publishing in the Gazette or a newspaper circulating in that constituency within the said time a notice stating such a petition had been presented and that a copy may be obtained by application to the Registrar of the High Court; or

(5) by posting within the said time on the notice board of the High Court of the State in which the constituency was situated a notice stating such a petition had been presented and that a copy may be obtained by application to the Registrar of the High Court.

[8] If I understand the counsel of the petitioner correctly, he is relying on mode 5 as set out by the learned judge. I am not quite sure how that helps him as there is no affidavit from the petitioner affirming as to when the notice and the petition had been posted. In his submission, counsel submits that since the respondent had not produced any evidence that the notice and the petition were posted after the 15 days, they are deemed to have been posted within the 15 days. With respect, r. 15(4) imposes a duty on the petitioner to file an affidavit of service stating 'by whom the documents were served, the day of the week and date on which the documents were served, where they were served and how they were served'. Here there was no such affidavit and the Court cannot rely on any assumption or presumption. In any event the old r. 15 had since been amended on 16 January 2003 and it now reads as follows:

15. Notice of petition and copy of petition to be served on respondent.

(1) Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within fifteen days of the presentation of the petition, be served by the petitioner:

(a) on the respondent personally which shall be effected by delivering the notice and a copy of the petition to the respondent;

(b) by sending the notice and a copy of the petition by pre-paid registered post addressed to the respondent at his usual or last known place of residence or business; or

(c) by posting a notice on the notice board of the High Court in the State in which that constituency or electoral ward is situated and by publishing a notice in a national language newspaper and in any other newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented and that a copy of the notice of presentation of the petition and a copy of the petition may be obtained by the respondent free of charge on application at the office of the Registrar.

(2) If the respondent to whom there has been addressed a pre-paid registered post referred to in sub rule (1):

(a) is informed that there is such a letter awaiting him at a post office but he refuses or neglects to take delivery of that letter; or

(b) refuses to accept delivery of that letter when tendered to him,

the notice and a copy of the petition shall be deemed to have been served on him on the date on which he is informed that there is such a letter awaiting him or when the letter is tendered to him, as the case may be.

(3) For the purpose of subrule (2), a statement by the officer in charge of a post office stating that to the best of his knowledge and belief:

(a) there has been delivered to the address appearing on the pre-paid registered letter a post office notification informing the addressee that there is such a letter awaiting him; or

(b) there has been tendered for delivery to the addressee such a letter, shall, until the contrary is proved, be evidence that the addressee has been so informed or that the registered letter has been tendered to him, as the case may be.

(4) An affidavit of service of the documents referred to in subrule (1) stating by whom the documents were served, the day of the week and date on which the documents were served, where they were served and how they were served must be filed in the Court in which the petition was presented.

[9] The new r. 15 now provides three modes of service of the notice of presentation of a petition and the petition. Counsel for the petitioner, of course, had not referred the court to the new r. 15 and that begs the question why. The answer of course is glaring and that is the petitioner had not complied with any of the mode of service as required by the new r. 15. The mode of service by way of posting the notice and petition on the notice board of the High Court must now be accompanied by a publication of a notice in a national language newspaper and in any other newspaper circulating within the constituency stating that such a petition had been presented and a copy of the petition may be obtained by the respondent free of charge on application at the office of the registrar. Again there is no evidence from the petitioner that he had made such a publication.

[10] This brings me to the 2nd contention of the petition and that is whether r. 15 is a mandatory provision. Counsel for the petitioner relies on the case of *Harris Mohd Salleh v. The Returning Officer (Ismail Majin) & Ors* [2000] 4 CLJ 104 at p. 108, where the learned judge there cited with approval the decision in the case of *Muip b. Tabib v. Dato' James Wong* [1971] 1 MLJ 247 where B.T.H. Lee J said that r. 15 is not mandatory as to the mode of service and that where the rule is directory as to the mode of service, substantial compliance is sufficient. Counsel is of course relying on this part of the judgment where it states:

> There are two limbs in this r. 15: one as to time of service and two as to the mode of service. In the first limb, the time of fifteen days of the presentation of the petition, is expressed in mandatory terms; the word used is "shall"; it is therefore mandatory that such service must be made within the prescribed time, ie, fifteen days of the presentation of the petition, and failure to comply strictly with the time for service will render the petition a nullity. There is a plethora of cases in support of this; in *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261 where Lord Upjohn said at p. 264:
>
> > So the whole question is whether the provisions of rule 15 are "mandatory" in the sense in which that word is used in the law, ie, that a failure to comply strictly with the times laid down renders the proceedings a nullity; ...
>
> His Lordship said further at p. 265:
>
> > On the whole matter their Lordships have reached the conclusion that the provisions of rule 15 are mandatory and the petitioner's failure to observe the time for service thereby prescribed rendered the proceedings a nullity.

See also *Muip b. Tabib v. Dato' James Wong* [1971] 1 MLJ 247; *Tengku Korish v. Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6; *Chong Thain Vun v. Watson & Anor* [1968] 1 MLJ 65 and *Rhina Bhar @ Rani Raj Pal v. Karpal Singh a/l Ram Singh & 2 Ors* [1995] 4 CLJ 642.

The 2nd limb of r. 15 prescribes the modes of service which are not mandatory, and the word used is "may" which is directory. There are five modes of service mentioned in r. 15 which are specially mentioned in the alternatives, and a petitioner may choose to comply with at least one of the modes, eg. by Gazette notification or by advertisement in newspapers etc. It is clear that the mode of service is directory and that any one mode of service may be used. That is to say, a petitioner may observe one mode of service, it is sufficient for the purpose of service under r. 15. This found support in *Muip b. Tabib v. Dato' James Wong (supra)* where B.T.H. Lee J said at p. 249:

> To my mind rule 15 is not mandatory as to the mode of service. The word "shall" appears in the first sentence of the rule, which indicates that the rule is mandatory, but I am of opinion that where the rule is directory as to the mode of service, substantial compliance is sufficient.

[11] Again and with respect, I am amazed that counsel for the petitioner has seen it fit to mislead the court by ignoring the fact that the old r. 15 was worded differently to that of the new r. 15. In the old r. 15, the words used were 'Such service may be effected either …'. No such words are used in the new r. 15 and if one looks at the new r. 15 carefully, it has deliberately left out the word 'may' and now provides that the petitioner 'shall' serve the notice of the presentation of petition and the petition *via* the three modes of service as provided. By that omission I am left in no doubt that the intention of Parliament is to make compliance of the new r. 15 mandatory.

[12] In the recent case of *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors* [2005] 2 CLJ 237, the Federal Court in dealing with the interpretation of s. 32(b) of the Election Offences Act 1954 sets out the law in constructing statutes as thus:

> … In *Foo Loke Ying & Anor v. Television Broadcast Ltd. & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122, the then Supreme Court speaking through that distinguished judge Abdoolcader SCJ (as he then was) stated that the court is not at liberty to treat words in a statute as mere tautology or surplusage unless they

A are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.

B Further, in *Chin Choy & Ors. v. Collector of Stamp Duties* [1979] 1 MLJ 69, the Federal Court stated that applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences
C according to the rules of grammar.

Bearing in mind the above authorities, we must say with respect that Lord Denning's approach in the case of *Morgan v. Simpson (supra)* cannot be applied here as our s. 32(b) on which the appellant's petition is based is crystal clear in its language. To
D accept such an interpretation would defeat Parliament's intention in enacting s. 32(b).

[13] As for the petitioner's counsel's contention that in interpreting the Election Rules one must take into consideration
E the overriding principles of democracy and the need to protect the purity of the election process, I can do no better than to quote what was stated by the Federal Court in *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors (supra)* when dealing with a similar contention:

F We do agree with the submission of learned counsel for the appellant that due emphasis should be given to the overriding principles of democracy and the need to protect the purity of the election process but at the same time we cannot ignore the elementary rule of construction that where the meaning of the
G words in a statute is plain and unambiguous, as in this case, the court is left with no choice but to give effect to its plain meaning. It is not for us judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning.

[14] Accordingly, the petition is hereby struck out with costs to
H be taxed unless agreed to the respondent.

I